

GENERAL EXCEPTIONS CLAUSES

Armand de Mestral

McGill University

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General Exceptions Clauses in Mega-Regionals

- What difference between exceptions clauses in bilaterals, plurilaterals and mega-regionals ?
- Is a different approach being taken in mega-regionals ?
- Not clear
- But recent mega-regionals negotiations involving developed democracies (CETA, TTIP, TPP) do appear to have elicited public demand for broader exceptions clauses

Scope of exceptions clauses

- In fact cover a very wide range of issues (security, taxation, public employment, environment, labour standards, human rights)
- But focus of current concerns on foreign investment protections – especially investor-state arbitration (ISA)

Public demand for general exceptions clauses

- Increasingly hostile reaction to foreign investment protections (especially ISA) in developed democracies
- Growing inclusion of investment protections in FTAs not just in BITs
- More foreign investment protections now between developed democracies (NAFTA, EU accession, CETA)
- Greater potential for ISA against governments of developed democracies (NAFTA, Eastern Sugar, Vattenfall etc)
- Fear in democracies that public interests will be adversely affected (Australia, Canada, USA, EU, Japan, South Korea etc)
- Propriety of submitting public policy issues to arbitral tribunals rather than domestic courts

Public response to foreign investment protections

- Limited to developed democracies?
- By no means clear – but they are seldom given the choice
- Venezuela, Bolivia, Ecuador – marginal cases?
- South Africa – not so marginal ?

General Exceptions Clauses: a recent development?

- Contrast Germany – Pakistan BIT 1959 and CETA 2014 (9 v 45 pages)
- Different philosophy and approach
- Decision made to include extensive exceptions in recent agreements
- Debate in EU – 2004 – 2013 EU has opted for extensive and explicit exceptions (traditional national model discarded for new EU approach)
- Pressure on NAFTA parties for greater transparency – also felt in ICSID)
- NB. Focus of current debate on ISA, investment chapter - but not limited to this. Hard to separate the particular ISA debate from the general

Exceptions clauses in long-standing mega-regionals

- EU: TFEU **arts. 39, 73, 167, 168** etc., national security, property law, internal disturbances, monetary crisis, territorial application exceptions, Northern Cyprus, exclusion from voting, attribution, subsidiarity, proportionality etc
- MERCOSUR: reciprocity principle [**art. 2**]; equitable trade terms [**art. 4**]; transition period Paraguay and Uruguay [**art. 6**]; etc.
- ASEAN: general exceptions (health, public morals...) [**art. 8**]; security exceptions [**art. 9**] etc.
- Andean Pact: general exceptions (health, national security, national treasures...) [**art. 72**]; protection of goods and property [**art. 49**]; proportionality [**art. 136**]; Bolivia and Ecuador (technical assistance and advantages for these countries) [**arts. 136 and 155**]; etc.
- SADC: sovereign equality, human rights, equity (...) [**art. 4**]; promotion of peace and security, sustainable development, transfer of technology (...) [**art 5**]; natural resources and environment, social welfare, cultural industries, food security... [**art. 21**] etc.
- EFTA: Mutual assistance [**art. 6**]; Exceptions (health, environment...) [**e.g. arts 13, 27...**]; Prudential measures [**e.g. art. 25**]; security exceptions [**art. 39**]; safeguard measures [**art. 40**];

Exceptions in highly integrated customs unions

- Exceptions will be by way of positive command (eg. legislation shall be on the basis of a high standard of protection) rather than by way of exclusion of application.

Exceptions : focus on recent FTAs

- Customs unions have a different dynamic
- Require specificity
- Less scope for incremental development

Exceptions : Problem of definition

- What is an exception?
- How draft an exception?
- Many different approaches

Substantive Exceptions: different models

- positive,
- negative,
- traditional (tax, security),
- special (cultural industries, water),
- statements of interpretation,
- statements of application,
- general chapters,
- specific provisions in investment chapter etc.,
- carve-outs (ie financial services v investment ch.)
- Statement of conformity with WTO waiver
- Annexes “grandfathering” non-conforming laws CETA = 1000 pages!

Procedural Exceptions

- screening of claims by arbitral tribunals or states parties,
- Interpretations by the states parties,
- Determination of applicability (taxation measure or not)
- arbitrator selection panels,
- appeals mechanism
- transparency of all proceedings and documents

Different modes of drafting

- Borrow from GATT art XX
- Incorporate parts of art XX by reference
- Apply art XX to exceptions from NT for goods or GATS art XIV for certain services
- Interpret art XX to include worker or environmental protection
- Specific drafting of environmental or labour standards
- Define content of labour standards exception
- Adopt different approaches to similar issues (Canada: cultural industries; EU culture and audiovisual

CETA as an example: where find exceptions?

- Preamble
- Ch. 2 General definitions
- Ch. 5 trade remedies
- Chapter 10 Investment: X.1 Scope and application; X.2 relations to other chapters; X.3 definitions; X.4 market access « for greater X.7.4 (MFN does not include dispute settlement); X.9 treatment of investors – positive definitions ...; X.11 Expropriation – exceptions definition of indirect expropriation; X.12 transfers exceptions bankruptcy etc; X.

CETA. Annex X.11.3

- 3. For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, nondiscriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.
- Cited in The Economist October 11, p. 14 Editorial: « A better way to arbitrate »

CETA exceptions - 2

- X14. Articles X.4 (Market Access), X.5 (Performance Requirements), X.6 (National Treatment), X.7 (Most-Favoured-Nation Treatment), and X.8 (Senior Management and Boards of Directors) do not apply to:
- (a) an existing non-conforming measure that is maintained by a Party at the level of:
 - (i) the European Union, as set out in its Schedule to Annex I;
 - (ii) a national government, as set out by that Party in its Schedule to Annex I;
 - (iii) a provincial, territorial, or regional government, as set out by that Party in its Schedule to Annex I; or
 - (iv) a local government.
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a).

CETA – Exceptions - 3

- X.16 formal requirements
- X.27 applicable law (binding « prior? » interpretation by states parties)
- X.29 claims without merit
- X.30 claims unfounded in law
- X.33 transparency
- X.42 Committee on Services – powers of interpretation, regular review of the process, creation of appellate mechanism
- X.43 exclusions – Investment Canada decisions..

CETA exceptions - 4

- Ch 15 financial services – exceptions throughout framed in many ways
- **XV.15: *ARTICLE 15: PRUDENTIAL CARVE-OUT***
- Nothing in this Agreement shall prevent a Party from adopting or maintaining reasonable
- measures for prudential reasons, including: the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a Financial Institution, or cross-border financial service supplier or financial service supplier; the maintenance of the safety, soundness, integrity or financial responsibility of a Financial Institution, cross-border financial service supplier or financial service supplier; or ensuring the integrity and stability of a Party's financial system..... Et al

CETA exceptions - 5

- Chs 21 – 25 IP enforcement, sustainable development, labour, environment
- Ch 32 EXCEPTIONS
- **X.02: General Exceptions**
- 1. For the purposes of Chapters X through Y and Chapter Z (National Treatment and
- Market Access for Goods, Rules of Origin, Origin Procedures, Customs and Trade Facilitation,
- Wines and Spirits, Sanitary and Phytosanitary Measures, Investment Section 2 (Establishment of
- Investments) and Investment Section 3 (Non-discriminatory Treatment)), GATT 1994 Article
- XX is incorporated into and made part of this Agreement. The Parties understand that the
- measures referred to in GATT 1994 Article XX (b) include environmental measures necessary to
- protect human, animal or plant life or health. The Parties further understand that GATT 1994
- Article XX (g) applies to measures for the conservation of living and non-living exhaustible
- natural resources.....
- Capital movements, balance of payments national security, taxation, culture etc....
- X.33 dispute settlement
- Declarations, understandings annexes et al

Practical impact of adding extensive exceptions clauses

- Clarity
- Precision
- Length (1959 Germany Pakistan = 8 pages; Canada – China 2012 = 45)
CETA contains a wide variety of exceptions; FTA extensive treatment of exceptions in CETA 2014 v NAFTA 1993
- Prolivity

Legal consequences of expanded coverage of exceptions: positive

- Greater protection of the public interest
- Greater certainty that the regulatory function of states will be respected and that reasonable regulatory policies will not be challenged
- Increased specificity should serve as a guide to arbitrators
- Less « trying it on for size » by eager lawyers
- More transparent and defensible ISA process
- Greater public acceptance of FTAs and BITs

Legal consequences of exceptions: negative

- End of the « inherent public policy clause »
- Uncertainty as to the interpretation of earlier simpler drafting (2500 BITs, 400+FTAs)
- Danger of restrictive interpretation of exceptions as with WTO
- With greater specificity what not explicitly prohibited will be deemed permitted (eg a narrower reading of the taxation exception)
- Inherent confusion created by prolix texts (ie what is and is not a performance requirement?)
- Arbitrators will have their hands tied in ISA
- Arbitrators will not listen *Phillip Morris v Ecuador* (preliminary jurisdictional objection rejected)

Legal consequences of exceptions

- Compare the powers of a court with the powers of an arbitral tribunal
- *ISA v Francovitch* or *Brasserie du Pêcheur*
- Damage action against states and the EU under EU law much stronger but judicially restrained

My research project for Centre of International Governance Innovation (CIGI)

- Focus on ISA:
- 1) propriety of recourse to ISA between **developed democracies**
- 2) propriety of recourse to ISA more generally
- are exceptions clauses the answer to criticisms ?
- welcome your comments now and in coming months